

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

DOMINICK LAROCCO,

Plaintiff,

vs.

9:06-CV-1248

GLENN S. GOORD, Commissioner;
JOHN NUTTALL, Dept. Commissioner of
Programs; and LINDA HOLLMAN, District
of Education,

Defendants.

APPEARANCES:

DOMINICK LAROCCO
97-A-1248
Plaintiff, *pro se*

DAVID N. HURD
United States District Judge

DECISION and ORDER

I. Background.

The plaintiff has filed a letter request seeking to vacate this Court's October 30, 2006 Order. Dkt. No. 12.

By way of background, this action was filed on October 12, 2006. Dkt. No. 1.¹ This Court granted plaintiff's application to proceed *in forma pauperis* and directed him to file an amended complaint. Dkt. No. 7. Rather than file the amended complaint, plaintiff filed a notice of appeal to the Second Circuit Court of Appeals. Dkt. No. 8. On May 24, 2007, this Court received the Second Circuit's mandate dismissing plaintiff's appeal. Dkt. No. 11. Thus, this action remains open in this Court.

¹ Plaintiff has filed five other actions in this District.

II. Motion to Vacate.

Plaintiff's motion to vacate the October 30, 2006 Order seeks to vacate that portion of the Order directind that he was responsible for payment of the filing fee.² Plaintiff alleges that this Court violated his right to due process and equal protection because it did not allow his case to proceed or to require the defendants to answer the complaint. Dkt. No. 12. However, plaintiff appears to take no notice of the fact that this case remains open, and that he was afforded the opportunity to file an amended complaint if he wished to proceed with the action. See Dkt. No. 7. Plaintiff also fails to acknowledge that on October 22, 2006, he executed an inmate authorization form that states: "I understand that the total filing fee which I am obligated to pay is \$350.00. I also understand that this fee will be debited from my account regardless of the outcome of my lawsuit." Dkt. No. 5. Plaintiff filed the authorization form with the Court on October 24, 2006. *Id.*

Plaintiff is advised that payments made for the filing fee cannot be refunded, nor can his future indebtedness be cancelled. Pursuant to the Prison Litigation Reform Act ("PLRA"), 28 U.S.C. § 1915(b), a plaintiff, in seeking *in forma pauperis* status, becomes obligated to pay the full filing fee, regardless of the outcome of the action. See, e.g., *Goins v. DeCaro*, 241 F.3d 260, 262 (2d Cir. 2001) (inmate who withdraws his appeal is not entitled to a refund of the filing fee paid or a cancellation of the remaining indebtedness); *Williams v. Roberts*, 116 F.3d 1126, 1127-28 (5th Cir. 1997) (per curiam) (plain language of the PLRA requires court to assess filing fees once matter is filed,

² Plaintiff also seeks to vacate the Order of the Second Circuit that required him to pay the filing fee for his appeal. However, that request must be presented to the Second Circuit Court of Appeals.

regardless of ultimate outcome of proceeding) (citations omitted); *McGore v. Wrigglesworth*, 114 F.3d 601, 605 (6th Cir. 1997) (“[B]y filing the complaint or notice of appeal, the prisoner waives any objection to the fee assessment . . .”).

Accordingly, plaintiff’s request to vacate that portion of the October 30, 2006 Order that requires him to pay the filing fee for this action is denied.

In the event plaintiff wishes to proceed with this action, he may file an amended complaint that complies with the October 30, 2006 Order within thirty days from the filing date of this Order. If plaintiff fails to file an amended complaint, this action will be dismissed without further Order of this Court.

____ THEREFORE, it is

ORDERED, that

1. Plaintiff’s motion to vacate the October 30, 2006 Order (Dkt. No. 12) is DENIED;
2. If plaintiff so desires, he shall file an amended complaint within thirty (30) days of the filing date of this Order;
3. If plaintiff fails to comply within thirty (30) days from the date of the filing of this Order, the Clerk of the Court shall enter judgment dismissing this action without further order of this Court due to plaintiff’s failure to comply with the terms of this Order;
4. Upon the filing of plaintiff’s amended complaint, the file in this matter shall be returned to the Court for further review;
5. The Clerk is directed to serve a copy of this Order on plaintiff by regular mail.

IT IS SO ORDERED.



D.N.H.
United States District Judge

Dated: July 13, 2007
Utica, New York.